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No. 85-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SALVATORE REALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented

1. Whether, when the defense makes substantiated allegations of shockingly pervasive Governmental misconduct—including, for example, (a) the prosecution's concealment of a written cooperation agreement with its chief witness, an informant who had been promised a financial "bonus" contingent on the success of the prosecution; (b) such rampant perjury by that witness at trial that the district court repeatedly commented that it had never seen anything like it; (c) prior payments of nearly $200,000 to that witness in "salary, service and expenses" which he was not required to pay taxes on; and (d) widespread independent criminal activity during the investigation by the informant and FBI undercover agent—an evidentiary hearing on Governmental misconduct is required.

2. Whether, as a matter of law, proof of isolated involvement in the making of a single loan at unlawful interest rates can justify a conviction for participating in the affairs of a "RICO" enterprise through collection of unlawful debt, 18 U.S.C. §§1961(6) and 1962(c) & (d).*

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* In addition to petitioner Reale, two other defendants-appellants were parties to the proceedings in the Eleventh Circuit—Robert DeSimone and Ronald Pearlman.

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Opinions Below

The *per curiam* order of the court of appeals (Pet. App. A, p. 1a) affirming the conviction without opinion is unreported. The opinion of the district court (Pet. App. B, pp. 2a-8a) denying petitioner's post-trial motions is also not officially reported.

Jurisdiction

The order of the court of appeals affirming the conviction was entered on January 16, 1986, and a timely petition for rehearing *en banc* was denied on February 24, 1986 (Pet. App. C, pp. 9a-10a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

Constitutional Provision and Statutes Involved

The Fifth Amendment of the United States Constitution provides in pertinent part:

> . . . [N]or shall [any person] be deprived of life, liberty or property, without due process of law[.]

18 U.S.C. §1961 provides in pertinent part:

> (6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

18 U.S.C. §1962 provides in pertinent part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commence, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Statement

Course of Proceedings Below

Following a jury trial with four others in the United States District Court for the Southern District of Florida (Hastings, J.), petitioner Reale was acquitted on the "substantive" RICO count (Count 2), charging him with participating in the affairs of an enterprise through a pattern of racketeering activity by aiding and abetting (1) an extortionate collection of an extension of credit on January 4, 1982 (Count 2, ¶3, I and Act of Racketeering Activity (k)) and (2) an extortionate extension of credit on December 16, 1981 (Count 2, ¶3, I and Count 20), in violation of 18 U.S.C. §§1962(c) and 1963. He was also acquitted on one count (Count 20) of making, or aiding and abetting, the alleged extortionate extension of credit on December 16, 1981, in violation of 18 U.S.C. §§892(a) and 2. The only count on which Reale or any other defendant was convicted was the RICO conspiracy count, which charged an agreement to participate in the enterprise through a pattern of racketeering activity (centered on extortion), but which also went to the jury on an "alternative theory" permitting conviction if a defendant agreed to participate in the enterprise through collection of unlawful debt, regardless of extortion. 18 U.S.C. §§1961(6) and 1962(c) & (d) (App. 165-68; R.8:1780-1782).[1] Petitioner was sentenced to 20 months' imprisonment and a $15,000 fine, with a recommendation of immediate parole eligibility and a minimum security institution, 18 U.S.C. §4205(b) (2).

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[1] "App." refers to the record excerpts filed with Reale's brief on appeal to the Eleventh Circuit. "R." refers to the official Record on Appeal; numbers following "R." on the left hand side of the colon refer to the volume number of the Record on Appeal, and numbers following "R." on the right hand side of the colon refer to page numbers of the cited volume. "S.R." refers to the Supplemental Record on Appeal, as to which the same system of citation is used.

Aside from the acquittals of two defendants on the RICO conspiracy count, the counts resulting in acquittals for all defendants were as follows: Count 2, the substantive RICO count, charged all defendants with participating in the affairs of an enterprise through a pattern of racketeering activity predominately involving extortionate credit transactions, plus—as to some defendants, but *not* Reale—bribery of a public official and other predicate acts. 18 U.S.C. §§1962(c) and 1963 (R.1:16, 20-24). The remaining 16 counts were based on extortion, and each resulted in an acquittal.

On January 16, 1986, the court of appeals summarily affirmed the conviction of all three appellants on the RICO conspiracy count (App. A, p. 1a), and on February 24, 1986, it denied the petitions for rehearing *en banc* (App. C, pp. 9a-10a).

The Evidence at Trial

Briefly, the prosecution's evidence in this six-week trial —consisting mainly of the testimony of the undercover informer Iannuzzi, the undercover Agent Bonino and many taped conversations—dealt with two separate loans: Iannuzzi's $42,000 indebtedness to defendant Agro (who was not tried below), which predated the conspiracy charged here and in which Reale was not involved; and a $25,000 loan from defendant Ruggiano (who was also not tried below) to Bonino and Iannuzzi, which was to help finance "Suite 100," a bottle and gambling club. Ruggiano, Agro, DeSimone and Bonino were to be partners in Suite 100, and successful approaches were made to Police Chief Boone Darden about "protection." (R.12:35-36; R.13:93; R.14:18).

Reale's sole connection with this case was on December 16, 1981, and January 4, 1982, when, acting as a courier, he delivered part of the $25,000 loan and discussed its terms, including the usurious rate of interest. (R.16:32-33;

R.2:382-88; GX 122, 124, 128). Reale had nothing to do with Suite 100 or the bribery of Darden, completely disappeared from the scene after January 4th, and never collected any payments on the loan. The December 16th and January 4th conversations were the only occasions prior to trial that Iannuzzi or Bonino had ever seen or spoken with Reale. (R.2:154; R.27:30-31).

Though interest payments on the $25,000 loan were delinquent and incomplete, the prosecution was unable, despite the many hundreds of taped conversations, to produce a single recorded threat about the loan. Faced with this obstacle to its "extortion" case, Iannuzzi testified that on September 27, 1982, near the end of the investigation, Agro and Ruggiano threatened him about repaying the loan in conversations that just happened (he claimed) to be unrecorded. (R.20:14-18; R.22:143-46, 148-50).

Government Misconduct

A. Crimes by Iannuzzi and Agent Bonino during the investigation.

Our pretrial motion papers contained extensive allegations of widespread criminality by Iannuzzi and Bonino during the undercover investigation. As to Iannuzzi, these allegations included conversion of money used to finance Suite 100, submission of false expense claims to the FBI, extortionate credit transactions and narcotics trafficking. We made similar allegations as to Bonino. (R.2:392-94; R.4:799). After the prosecution categorically denied these allegations, we supported them with an extensive affidavit (R.4:789-842), based on sworn testimony by several witnesses, describing Iannuzzi's cocaine trafficking in Suite 100 in Bonino's presence, other narcotics transactions, various extortionate activities, *etc.* (R.4:793-96). Though the prosecution again categorically denied any such misconduct by Iannuzzi or Bonino (R.5:1018-19), cross-exami-

nation at trial put the lie to these blanket denials.[2] Indeed, with cross-examination looming ahead the prosecution made belated *Brady* disclosures (in the midst of Iannuzzi's direct testimony) concerning Iannuzzi's involvement with narcotics during the investigation (R.10:5-6; R.11:5-4, 5-5). On cross-examination Iannuzzi was pressured into admitting still other narcotics transactions, which he claimed he reported to the FBI case agent, though no FBI reports were produced (R.21:15-18; R.22:43-57; R.26:7). Defense counsel also managed on cross to extract further admissions from Iannuzzi about other crimes he committed while working for the Government (R.23:126-136; 141, 160-63). Evidence was adduced creating strong inferences of "skimming" by Iannuzzi and Bonino, though the district court denied the defense any access to the books and records of Suite 100 (R.19:3-4; see R.17:3).

Even more remarkably, the cross-examination of Agent Bonino showed him first denying—and later, after being confronted with piece by piece of documentary evidence, admitting—his participation in an insurance fraud with respect to Suite 100. After constant equivocations and claims of an inability to "recall," Bonino also eventually admitted that he had bought various items of discounted merchandise for his personal use knowing these items had been obtained with a stolen credit card. (R.28:40, 60-69, 86-92; R.29:3-11, 164-72). Compounding this misconduct, the prosecution claimed at trial that Bonino was merely engaged in undercover roleplaying—even though no FBI reports on these incidents were produced, and no explanation was offered for Bonino's initial denial on cross that the underlying acts had even occurred. After Bonino also denied participation in other crimes (cocaine trafficking, extortion, *etc.*), counsel for Reale offered to prove in a misconduct hearing that his denials were false. (R.28:56-59; R.7:1631).

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[2] *E.g.*, R.10:5-6; R.21:102-124; R.11:5-4, 5-5, 5-6, 5-16; R.21:15-18; R.22:43-57; R.26:5-7; R.22:70-73; R.23:126-136, 141, 160-63, 216-19, 71-73; R.28:60-61, 86-92, 40, 56-59; R.29:3-11, 164-72. (See Reale's brief to the court of appeals at pp. 22-26).

B. The contingency fee agreement with Iannuzzi, and Iannuzzi's rampant perjury at trial.

In addition to paying Iannuzzi nearly $200,000 in salary, services and expenses even as of August 31, 1983 (long before trial here), the prosecution also admittedly agreed (R.2:408):

> to pay Iannuzzi a lump sum after all trials have been completed, which would be based on the F.B.I.'s evaluation of the overall quality of any cases that may have been developed.

Iannuzzi reluctantly admitted on cross that it "crossed his mind" that his "bonus" depended on the number of people convicted in this case (R.22:85; see R.23:59).

Although the prosecution repeatedly denied the existence of any written cooperation agreement with Iannuzzi (R.11: 5-10), the court's *sua sponte* questioning of Iannuzzi alone and *in camera* precipitated an admission to the contrary (R.11:40-41):

> THE COURT: . . . I did want to ask you just one thing and that's whether or not in whatever your situation is with the Government, whether or not you have that in writing.
>
> MR. IANNUZZI: What I told them yesterday?
>
> THE COURT: No, no, not yesterday, but your agreement to participate with this thing.
>
> MR. IANNUZZI: Yes, sir. It was in writing. I signed it with the supervisor[,] Larry Doss and Gunnar Askeland, the assistant case agent. When it was sometime in late January of 1981.
>
> THE COURT: 81?
>
> MR. IANNUZZI: Or early February.
>
> THE COURT: And they spelled out the terms that they were allowing for you insofar as your co-operation?

> MR. IANNUZZI: Yes, sir, I have a copy of that. Not with me but I can bring it the next time I go to court.

After this came out, the prosecutor claimed that Iannuzzi was "confused" and actually meant to refer merely to a written consent to record conversations.

A whole range of objective factors indicate that Iannuzzi meant what he said. For example, the various consent-to-record forms had four dates, from February to June, and were with the FBI, whereas the *in camera* discussion referred to a single cooperation agreement, then at Iannuzzi's home (*e.g.*, R.13:51-52). The court itself made repeated findings in the record that Iannuzzi had clearly meant to refer to a written cooperation agreement (*e.g.*, R.13:39). As the court stated to the prosecutor (R.13:39): "Either he's lying or you are, Mr. Theus." After observing Iannuzzi's blatant lying on the witness stand, the court made its final comment about the existence of a written cooperation agreement (R.23:235):

> THE COURT: . . . What troubles me more than anything else when this man is on this witness stand and as a matter of convenience, he tends to remember what he wants to remember and tends to forget what he wants to forget.
>
> Let me tell you something, I went along with that story about misunderstanding me. *There was no way in hell he misunderstood me. It was as clear as day.* (Emphasis added.)

We argued below that Iannuzzi committed perjury by testifying about a number of key "unrecorded" conversations—such as the threats allegedly made on September 27, 1982 (R.7:1631-1632). Because Iannuzzi's perjury was so blatant, the court itself made recurrent comments, out of the jury's presence, about the concerns raised by such a revolting testimonial performance (*e.g.*, R.23:235-37, 249;

R.22:34-35, 25; R.21:5-6). The court, for example, observed at one point (R.23:236-37) that Iannuzzi's obvious lying "causes me some serious problem with allowing a witness like that to tell whatever it is he's telling the jury."

Two blatant examples of the kind of incident that troubled the court will suffice. Iannuzzi testified that on April 2, 1981, he paid one of the defendants on the Agro loan with money orders. The money orders, however, had actually been cashed by March 11, 1981. This the defense managed to establish by analyzing the grand jury testimony of the postal custodian of the money orders. Significantly, the prosecution had introduced only the fronts of these orders (as opposed to the fronts and backs of the many others introduced), whereas the backs would have shown clearance on March 11th. An inference can fairly be drawn that Iannuzzi was pocketing money designated to pay off loans, and the prosecution acquiesced in his perjury. (S.R.23:216-219, 227-32, 248; R.12:59; R.2:79-80, 145-48). Iannuzzi's reckless lies are also illustrated by his placing a defendant at an important meeting, when overwhelming alibi proof made his presence there impossible. (R.23:61, 198-210; R.32:36-37, 43-52, 55-57, 61-65, 68-70, 76-79). Having observed the impeachment of Iannuzzi on these points, and his testimony in general, the court commented that Iannuzzi was clearly lying in each instance and reiterated its concern with Iannuzzi's patent perjury (*e.g.*, R.23:229, 235-38).

C. Iannuzzi's tax-free income.

While Iannuzzi was a salaried informant, he never filed tax returns or paid taxes despite his lavish financial arrangements with the Government. Iannuzzi claimed that he was advised to file returns (but only as to tax years 1981 and later), and he could "not recall" whether any Government agent asked to see his tax return (R.21:77-79, 137-38). The prosecutor's initial position was that a witness's tax returns are "confidential" (R.16:6); after being ordered to

produce the returns, the prosecutor admitted none had been filed, explaining that if someone "doesn't file a return," he can be asked to do so but "there isn't anything further a person can do" (R.17:7-8). Having heard these lame excuses, the court responded: "They can indict [him]" (R.17:8; R.23:238).

D. Other misconduct.

Briefly, the record also reflected instances of significant additional misconduct.

1. The prosecution failed to make timely disclosure of numerous §3500 materials, despite frequent assurances that disclosure was complete. Further, no "302" reports were made on many important meetings. In one instance the prosecution revealed the existence of a "302" report for the first time only after counsel for Reale had tried to impeach Bonino with his failure to make reports. (R.27:92-106; R.28:3-40; see R.9:5, 26; R.13:5; R.19:103-119; R.20:40). As noted, the prosecution also showed a disregard for its *Brady* obligations.

2. The court repeatedly admonished Iannuzzi, out of the jury's hearing, for being a "dangerous" witness by failing to answer questions and blurting out extraneous answers to smear the defendants (*e.g.*, R.22:33-37; R.25:30-31). After observing Bonino's performance, the court expressed the same concern about him (R.26:127), and admonished the prosecutor for asking obviously improper questions designed solely to cause prejudice (*e.g.*, R.16:66-69; R.25:79-80; R.29:42; see R.21:5-6; R.22:50-51). The record also reflects that the FBI case agent gave improper signals to Iannuzzi and Bonino during their testimony (R.24:118; R.29:7-11, 167).

3. As part of his unsuccessful effort to force the recusal of the district judge, the prosecutor made sworn statements that were flatly contradicted by the court reporter (R.5:960-66). This bogus attempt to delay the trial and (as we

demonstrated below) to judge shop, based in large part on false assertions, required defense counsel to engage in extensive and expedited litigation in the district court and in the court of appeals up to the very eve of trial. (See Reale's brief to the court of appeals at pp. 8-11).

4. The prosecution also denied that the FBI had intervened on Iannuzzi's behalf with local authorities, contrary to circumstantial evidence in the record demonstrating these denials to be false. (R.3:544; R.4:802, 815-830; R.4:802-803, 832-41; R.23:36).

The Analysis by the Courts Below

In rejecting the request for a hearing on Governmental misconduct, the district court held that the defense allegations did not "reach that level of outrageousness so as to violate due process or 'fundamental fairness shocking to the universal sense of justice . . . ' *United States v. Russell,* 411 U.S. 423 (1973) . . . " (Pet. App. B, p. 8a). The court of appeals affirmed without opinion (Pet. App. A).

REASONS FOR GRANTING THE WRIT

I. A Hearing on Governmental Misconduct is Required.

In *United States v. Russell, supra,* 411 U.S. at 431-32, this Court observed that " . . . we may some day be presented with a situation in which the conduct of law enforcement officials is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California,* 342 U.S. 165 . . . (1952) . . . . " We submit that the extensive allegations of Governmental misconduct here, permeating the investigation, pre-trial proceedings and the trial itself, show a course of behaviour so shocking to the conscience that it cannot be tolerated under either due process principles or the federal court's supervisory powers over criminal justice. Viewed cumulatively, these

substantiated allegations of misconduct here show such a pervasive lack of prosecutorial integrity that, at the very least, an evidentiary hearing should be granted. In determining whether a hearing is required, it is settled that our allegations, if supported by credible evidence, must be taken as true, and all reasonable inferences should be drawn in our favor. *Russo v. United States,* 404 U.S. 1209 (1971) (Douglas, J., sitting in chambers). *United States v. Toscanino,* 500 F.2d 267, 281 (2d Cir. 1974). Measured against that standard of review, the allegations here offer an appropriate vehicle in which to determine whether such a gross pattern of misconduct and falsification should bar a conviction.

In addition, this Court should address the validity of contingency arrangements for Government witnesses because that issue has led to diverse opinions and rulings among the federal (and state) appellate courts.

In *Williamson v. United States,* 311 F.2d 441, 444 (5th Cir. 1963), for example, the court held that it could not "sanction a contingent fee agreement to produce evidence against particular named defendants as to crimes not yet committed." While there is no *per se* rule against contingency agreements with informants, *United States v. Valle-Ferrer,* 739 F.2d 545 (11th Cir. 1984) (*per curiam*), the courts have traditionally expressed concern that such agreements can create improper motivations during the investigation and an excessive risk of perjury before the grand jury and at trial. *E.g., Williamson v. United States, supra; United States v. Dailey,* 759 F.2d 192, 200-201 (1st Cir. 1985); *State v. Glosson,* 462 So.2d 1082, 1085 (Fla. 1985) (indictment should be dismissed where informant "had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee"); *United States v. Waterman,* 732 F.2d 1527, 1531 (8th Cir. 1984), *vacated en banc by an equally divided court* (agreement

contingent on success of prosecution "is nothing more than an invitation to perjury having no place in our constitutional system of justice").

The facts here illustrate these concerns far more compellingly than the facts in any reported decision that we have found. Like his huge salary, Iannuzzi's bonus was apparently to be enormous, and presumably tax-free. Most remarkably, the danger of perjury here was demonstrably realized by Iannuzzi's trial testimony, which was so blatantly perjurious that the district judge repeatedly remarked that he had never seen anything like it. Finally, if—as the district court believed after interviewing Iannuzzi—there was a written agreement, its concealment requires in itself a dismissal of the indictment. All these circumstances, combined with the entire pattern of Governmental falsification and criminality typifying this investigation and prosecution, surely warrant a hearing. *See, United States v. Payner,* 447 U.S. 727, 737 n. 9 (1980); *United States v. Twigg,* 588 F.2d 373 (3rd Cir. 1978).

II. As a Matter of Law, Petitioner's Isolated Participation in the Making of a Single Loan Does Not Amount to Participation in the Affairs of a "RICO" Enterprise Through Collection of Unlawful Debt.

Another issue of exceptional importance here is whether the provisions of the "RICO" statute, 18 U.S.C. §§1961(6) and 1962(c) & (d), relating to participation in the affairs of an enterprise "through collection of unlawful debt" (*i.e.,* one involving usurious interest rates), apply to isolated involvement in the making of a single loan.

1. Because Reale participated only in the *making* of an unlawful loan, and did not do anything remotely constituting an attempt to *collect,* he cannot properly be convicted for conspiring to *collect* on an unlawful debt or to participate in an extortionate collection.

A characteristic of *any* loan is that both parties understand and accept the conditions by which the loan is to be repaid. The making of a loan always entails some explicit or implicit agreement between the parties as to the time, place and schedule of payments on interest and principal. All of this is merely the common understanding of what it means to make a loan, and it is plainly what Congress meant when it enacted the definition of an "extension of credit," 18 U.S.C. §891(1), and an "extortionate extension of credit," 18 U.S.C. §891(6).

Congress obviously drew a distinction between an extortionate extension of credit on the one hand (*e.g.*, 18 U.S.C. §§891(7) and 892), and an attempt to collect an extortionate extension of credit on the other (*e.g.*, 18 U.S.C. §§891(5) and 894). In construing these statutes, the courts have been careful to give content to the distinction drawn by Congress. For example, as the court of appeals stated in *United States v. Briola*, 405 F.2d 1018, 1021 (10th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973):

> From our reading of *Perez* [*v. United States*, 402 U.S. 146 (1971)], we are convinced that the real thrust of the legislation [18 U.S.C. §894] is directed to the use of extortionate means in order *to collect* monies which the creditors maintain are owing to them***.

(Emphasis added.) Similarly, the Second Circuit stated in *United States v. Natale*, 526 F.2d 1160, 1165 (1975), *cert. denied*, 425 U.S. 950 (1976):

> It is the effort of usurious money lenders, or "loan sharks," to seek extralegal methods of *enforcing* their unconscionable agreements which this statute [18 U.S.C. §894] is designed to restrain.

(Emphasis added; footnote omitted.) *See also, United States v. Bonanno*, 467 F.2d 14, 16-17 (9th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973).

Similarly, adopting the RICO statute, Congress criminalized only the "*collection* of unlawful debt," not the *making* of the underlying "usurious" loan. 18 U.S.C. §1962(c) (emphasis added). In limiting that prohibition specifically to *collection* activities, Congress can hardly be presumed to have forgotten the distinction it had so carefully drawn in the extortionate credit statutes. It bears remembering that extortionate extensions or collections of credit are defined by RICO to be "racketeering activity," while simple usury is not. In deciding to make certain instances of non-extortionate usury a violation of RICO, Congress chose to focus its attention solely on the collection activities associated with such loans. In interpreting the statute, the courts must, of course, give due regard to that statutory distinction, and cannot properly interpret the statute so as to obliterate the line drawn by Congress.

The only evidence concerning Reale was that he was present on December 16, 1981, when part of the $25,000 Ruggiano loan was given by others to Bonino, and that on January 4, 1982, while acting as a courier or messenger for Ruggiano, he delivered the remainder of the loan and discussed its terms with Bonino and Iannuzzi. Reale then completely disappeared from this case. The only agreement that can be imputed to Reale is that he agreed to assist in completing the making of a single loan. Significantly, Reale was not even named as an aider and abettor in Count 23 (App. 69; R.1:46), relating to the first collection on that loan on January 11, 1982.[3]

2. Further, Mr. Reale cannot properly be convicted on a "collection of unlawful debt theory" because the $25,000 transaction in question was a single loan, and it was not

[3] Reale was not involved in, or charged with, bribery of a public official or attempted murder. And gambling was not charged as a predicate act as to anyone, since that would have required extensive evidence of the size and duration of the gambling operation, which was never put into effect, 18 U.S.C. §§1955 and 1961(1)(B).

incurred in connection with "the business of lending money" at usurious rates.

The statutory definition of an "unlawful debt," set forth in 18 U.S.C. §1961(6), is:

> (6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the *business of gambling* in violation of the law of the United States, a State or political subdivision thereof, or the *business of lending money* or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate; (emphasis added).

In restricting the reach of RICO to debts incurred in connection with "the business of lending money," Congress clearly underscored its intent in RICO to punish only repetitive criminal conduct.

In *United States v. Salinas,* 564 F.2d 688 (5th Cir. 1977), the court construed the meaning of the parallel statutory phrase, "the business of gambling," where the law of Texas prohibited "gambling" but did not explicitly prohibit "the business of gambling." The *Salinas* court noted carefully that federal law (18 U.S.C. §1955) defines an "illegal gambling business" as a "substantially continuous operation" involving at least five or more individuals. *United States v. Salinas,* 564 F.2d at 691 and n.8. In explaining the importance of the inclusion of the concept of an illegal "business," the court emphasized the Congressional intention to "punish only large scale gambling operations. . . . " (*id.* at 691).

The same explanation, of course, applies to Congress' requirement that, under RICO, a debt be both usurious *and* incurred in connection with the business of making usurious loans. In enacting RICO, Congress sought to punish only "large scale" usury operations, as contrasted with small-time "loan sharking." Proof of *one* usurious loan can hardly be said to meet that criterion. Indeed, to allow a conviction to stand where the prosecution proves only *one* usurious loan simply reads out of the statute the "conjunctive requirement" that the debt be incurred in connection with the "business" of lending money at the statutorily specified usurious rates.[4]

Here, the prosecution has attempted to puff up what is, at most, the making of one usurious loan into a RICO conspiracy case by claiming that such isolated conduct amounts to the "business of lending money." The simple fact is, however, that one transaction—here, a single loan at an illegal interest rate—is not the repetitive conduct proscribed by RICO. And to treat Reale's isolated and fleeting role in the making of a single loan as participation in a RICO conspiracy stretches that statute beyond its intended limit. Accordingly, the conviction against Reale is without a proper basis.

III. Petitioner Reale Adopts the Arguments Advanced in the Petitions for Certiorari of Co-Defendants Pearlman and DeSimone.

Petitioner Reale also adopts, to the extent applicable, the arguments for certiorari contained in the petitions of his co-defendants.

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[4] That RICO was aimed at large-scale, repetitive criminal operations is, of course, fully supported by the legislative history. *See, e.g.*, 116 Cong. Rec. 35193, 35196, 35208 (1970); *H.R. Rep. No. 91-1549*, 91st Cong. 2nd Sess. at 35, 56, 186; *S. Rep. No. 612*, 91st Cong. 1st Sess. at 124, 158 (1969); *see also*, the legislative analysis of Title IX of the Organized Crime Control Act of 1970 (creating RICO), *U.S.Code Cong. & Admin. News*, 91st Cong., 2d Sess. 4007 at 4010 (1970).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
April 24, 1986

Respectfully submitted,

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APPENDICES

Appendix A

Order of Affirmance of the United States Court of Appeals for the Eleventh Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5658

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SALVATORE "SALLY" REALE, ROBERT DESIMONE, JR., RONALD PEARLMAN,

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(January 16, 1986)

Before HILL and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Cir. R. 25.

Appendix B

Post-Trial Order of the United States District Court for the Southern District of Florida

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

-vs-

ROBERT DESIMONE, JR.,
RONALD PEARLMAN, and
SALVATORE "SALLY" REALE, *et al.*,

Defendants.

CASE NO. 83-8044-CR-ALH

Post-Trial Order

THIS CAUSE has come before the Court on the Motion of Defendant ROBERT DESIMONE for Judgment of Acquittal Notwithstanding the Jury Verdict as to Count 1 or, in the Alternative, Motion for New Trial, the Motion of Defendant RONALD PEARLMAN for Judgment of Acquittal Notwithstanding the Jury Verdict as to Count 1 or, in the Alternative, Motion for New Trial, the Defendant SALVATORE REALE's Motion for Entry of a Judgment of Acquittal, or Alternatively for a New Trial, the Supplemental Post-Trial Motion of Defendant SALVATORE REALE, and the Post-Trial Motion of Defendant SALVATORE REALE for an Order Dismissing the Indictment or Granting an Evidentiary Hearing.

Defendants challenge the sufficiency of the evidence to support their convictions on RICO conspiracy charges, the jury instructions, the sufficiency of the Indictment, the introduction of testimony referring to Defendants' membership in an organized crime family, the introduction into

evidence of certain Title III taped interceptions, the Court's overruling of the Magistrate's determination that a severance was required because the Indictment charged multiple conspiracies, and the Court's refusal to allow the Defendants to introduce a taped conversation between the Government's principal witness and an individual named Sam Lano. In addition, Defendants ask the Court to dismiss the Indictment due to governmental misconduct during both pretrial investigatory proceedings and the trial proceedings of this cause, including the fee arrangement between the Government and its principal witness, the recusal motions and litigation, and non-disclosure of certain activities of the principal Government witness and the FBI undercover agent. Finally, Defendants ask the Court for an order requiring the Government to provide counsel with transcribed copies of all instructions given to the Grand Jury concerning the RICO counts, and move for a new trial because of alleged prejudicial extraneous matter affecting the jury's deliberations.

The Government has filed an 86-page Omnibus Response to all of these post-trial motions.

The Indictment charged the Defendants with conspiring to violate the Racketeering Influenced and Corrupt Organization (RICO) statute [18 U.S.C. §1962(d)] in Count 1, and with accomplishing such violation of RICO [18 U.S.C. §1962(c)] in Count 2. The Indictment additionally charged certain of the Defendants with interstate travel in aid of racketeering under 18 U.S.C. §1952(a)(3), the making of extortionate extensions of credit under 18 U.S.C. §892(a), and the collection of extensions of credit by extortionate means under 18 U.S.C. §894(a)(1) in Counts 3 through 35.

Following a jury trial, the Defendants DESIMONE, PEARLMAN, and REALE were convicted of the RICO conspiracy charges in Count 1, and were acquitted of all other counts against them. At trial, the bulk of the evidence presented

by the Government consisted of the testimony of the principal Government witness, Joseph Iannuzzi, and tape recordings of conversations between Iannuzzi and various of the Defendants.

The RICO conspiracy statute, 18 U.S.C. §1962(d), provides that it is unlawful for any person employed by or associated with any enterprise to conspire to conduct or to directly or indirectly participate in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. In *United States v. Carter*, 721 F.2d 1514 (11th Cir. 1984), this Circuit thoroughly discusses the evidence required to show an agreement to violate RICO and finds that it is perfectly consistent with federal conspiracy law that a RICO conspiracy agreement consists solely of an individual's agreeing to participate in the conduct of an enterprise's affairs with the knowledge and intent that at least two predicate acts, those acts which establish a pattern of racketeering activity, be committed. The Court holds as follows:

> In summary, we hold that where the government's evidence establishes that a defendant agreed to participate in a conspiracy with a single objective, the requisite pattern of racketeering necessary to the objective of a RICO conspiracy is lacking. Only by demonstrating that the defendant agreed to personally commit two or more predicate acts is this lack cured. . . . When, however, as in the present case, a defendant agreed to participate in the conduct of an enterprise's affairs with the objective of violating a substantive RICO provision, it is not necessary that the defendant agree to personally commit two predicate acts for the required pattern of racketeering activity. It is enough that the defendant agreed to the commission of two predicate acts. . . . The trial court did not err in refusing to instruct the jury that an

> agreement to personally commit two or more predicate acts was required in order to convict a defendant of a RICO conspiracy.

Carter, 721 F.2d at 1531. Thus, where evidence shows that a defendant agreed to participate in the conduct of an enterprise's affairs knowing of the objectives to violate any substantive RICO provisions, the Government need not show that such defendant personally committed or agreed to personally commit two predicate acts to prove a RICO conspiracy. Included in the substantive RICO provisions falling within the meaning of racketeering activity are extortionate credit transactions and the financing of any illegal gambling business. Furthermore, liability under a RICO conspiracy charge may well be premised on agreement to participate in a single act of collection of an unlawful debt, rather than in a pattern of racketeering activity. *See United States v. Riccobene,* 709 F.2d 214 (3d Cir. 1983), *cert. denied,* 104 S.Ct. 157 (1983).

In any event, viewing the evidence, including all inferences that might reasonably be drawn from it, in the light most favorable to the Government, the Court finds that a reasonable trier of fact could find the evidence sufficient to support the convictions of ROBERT DESIMONE, RONALD PEARLMAN, and SALVATORE REALE on the RICO conspiracy count.

With regard to the sufficiency of the Indictment and the Court's finding that no severance was required because of multiple conspiracies charged in the Indictment, the Court finds that from the evidence presented at trial, a reasonable jury could infer a single conspiracy with common objectives. *Carter,* 721 F.2d at 1531.

Defendants allege that the Court erred in its jury instructions in giving its RICO conspiracy charge as to Count 1 and in refusing to instruct the jury (1) that to prove the RICO conspiracy allegations the Government

had to show that Defendants personally committed, or agreed to personally commit, two predicate acts, and (2) that "the making of a loan is not the same thing as collecting, or attempting to collect, on a loan." For the reasons already enunciated above, the Court finds no error with regard to the first two of these three points. With regard to the third point, it is well established that it is not error for a court to refuse to give a requested instruction if it is substantially covered by other instructions which the court does give. *United States v. Luis-Gonzalez,* 719 F.2d 1539 (11th Cir. 1983); *United States v. Stone,* 702 F.2d 1333 (11th Cir. 1983). Since this Court gave detailed instructions on the two different offenses, "making an extortionate extension of credit" and "collecting or attempting to collect an extension of credit by extortionate means", the Court properly refused to give the requested instruction.

With regard to the remaining asserted errors, the introduction of testimony referring to Defendant's membership in an organized crime family, the introduction into evidence of certain Title III taped interceptions, and the Court's refusal to allow Defendants to introduce a taped conversation between the Government's principal witness and an individual named Sam Lano, the Court notes that while it required the Government to redact from the Indictment all references to the organized crime family, the testimonial references made by Government witnesses at trial were open to full and complete cross examination by Defendants, and the Court finds no merit in Defendants' arguments on this or the other two cited points.

The Court likewise finds insufficient cause shown in Defendant REALE's Supplemental Motion requesting an order requiring the Government to provide counsel with transcribed copies of all instructions given to the Grand Jury concerning the RICO counts and moving for a new trial because of alleged prejudicial extraneous matter which might have affected the jury's deliberations. The

Court carefully explored the latter allegation in post-trial hearings and, after questioning each juror and each alternate juror individually, concluded that the deliberations of the jurors, both individually and collectively, had not been affected or tainted by any prejudicial extraneous matters.

Finally, the Court has carefully considered the Defendants' Motion for entry of an order dismissing the Indictment because of alleged governmental misconduct or granting an evidentiary hearing on the allegations made, and finds that it can rule without the need for any evidentiary hearing. Defendants challenge that part of the fee arrangement between the Government and its principal witness, Joseph Iannuzzi, which provides that the Government would

> " . . . pay Iannuzzi a lump sum after all trials had been completed, which would be based upon the F.B.I.'s evaluation of the overall quality of any cases that may have been developed."

(September 29, 1983 letter from prosecutor to defense counsel). Since this witness was thoroughly questioned about this arrangement at trial and since there is no evidence that he was promised payment of the lump sum contingent upon the conviction of any particular person or indeed upon any convictions at all, the Court cannot conclude that the arrangement was objectionable so as to mandate dismissal of the Indictment. *United States v. Gray*, 626 F.2d 494 (5th Cir. 1980); *United States v. Garcia*, 528 F.2d 580 (5th Cir. 1976), *cert. denied*, ____ U.S. ____ (1976) Furthermore, the Court has carefully examined each of the remaining instances of alleged governmental misconduct cited in Defendants' Motion and cannot agree that any of them reach that level of outrageousness so as to violate due process or "fundamental fairness shocking to the universal sense of justice. . . " *United States v. Russell*,

411 U.S. 423 (1973), quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

The Court having reviewed the record in this cause, having carefully considered the memoranda submitted by the Defendants and by the Government, being otherwise fully advised in these matters, and for the reasons enunciated above, it is therefore

ORDERED AND ADJUDGED as follows:

1. The Motion of Defendant ROBERT DESIMONE for Judgment of Acquittal Notwithstanding the Jury Verdict as to Count 1 or, in the Alternative, Motion for New Trial is DENIED.

2. The Motion of Defendant RONALD PEARLMAN for Judgment of Acquittal Notwithstanding the Jury Verdict as to Count 1 or in the Alternative Motion for New Trial is DENIED.

3. DEFENDANT SALVATORE REALE's Motion for Entry of a Judgment of Acquittal, or Alternatively for a New Trial, Supplemental Post-Trial Motion for a new trial, and Post-Trial Motion for an Order Dismissing the Indictment or Granting an Evidentiary Hearing on the grounds of governmental misconduct are all DENIED.

DONE AND ORDERED in Chambers this 30 day of July, 1984.

/s/ Alcee L. Hastings

ALCEE L. HASTINGS
UNITED STATES DISTICT JUDGE

Copies furnished counsel:

Peter Schlam
Richard Rachlin
Mark Krasnow
Peter Outerbridge

Appendix C

Order Denying Appellant Reale's Petition for Rehearing and Suggestion for Rehearing *En Banc*

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5658

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

versus

SALVATORE "SALLY" REALE,
ROBERT DESIMONE, JR.,
RONALD PEARLMAN,

Defendants/Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC
(Opinion January 16, 11 Cir., 1986, ____F.2d ____).

Before HILL and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

APPELLANT REALE only

(✓) The Petition for Rehearing/ is DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

Appendix C

APPELLANT REALE only

( ) The Petition for Rehearing/ is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ *R. Lanier Anderson, III*

UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

FEB 24 1986

SPENCER D. MERCER
CLERK